



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO.432 OF 2010

**IN THE MATTER OF THE ESTATE OF CHABARI M' RIMUNYA alias CHABARI KARUNYA
(DECEASED)**

SIMON KAMUNDI.....PETITIONER

Versus

TABITHA GATIRIA MAINGI.....1ST OBJECTOR

PHILLIS KARUGU MWORIA.....2ND OBJECTOR

TOM MUTUMA CHABARI.....3RD OBJECTOR

MICHAEL MURERWA.....4TH OBJECTOR

RULING

Standing of a purchaser in a succession cause

[1] In view of the orders sought, I should think it is important to give a brief account of some important facts in this cause. A Grant of Letters of Administration of the deceased Estate was made to the Petitioner on 16th February 2011 and subsequently confirmed. In the Summons for Confirmation of grant, the interested parties were listed as and got their respective shares as purchasers. On 2nd October 2012 the Objectors filed Summons for Revocation of Grant whereupon Makau J on 18th October 2012 directed that the Summons shall be disposed of by way of viva voce evidence. On 14th December 2012, the Objectors intimated to court that they had closed their case and that further the purchasers can never be part of the Estate. Subsequent thereafter the parties agreed to file submissions on whether purchasers can be part of the estate, hence, this ruling.

The view taken by the Objectors

[2] The Objectors submitted that a purchaser for value of part of the estate, with or without notice, from a beneficiary or anybody else, but not the deceased, has no locus standi in the process of succession of the case. According to the Objectors such purchasers are strangers to the deceased's estate and their claim can only be adjudicated upon if the court makes a determination on who is to inherit the suit land. It was further submitted that the duty of the High Court in succession matters is to determine who the beneficiaries of the estate of the deceased are, the properties that comprise the deceased's estate and the mode and distribution of the estate

properties to the dependants of the deceased. They concluded, therefore, that the interested parties claim cannot be entertained in these succession proceedings but in a different forum; they were at liberty to commence proceedings against the petitioner. For this proposition the objectors relied on the decision of Makau J in the case of **MURIUKI MUSA HASSAN V ROSE KANYUA MUSA AND 4 OTHERS (2014) eKLR**.

The Petitioner's stand point

[3] The Petitioner submitted that the Grant to him was confirmed upon disclosure of the fact he had sold part of the estate. He, therefore, contended that at this point the interested parties were entrenched in the suit and removing them from the record will be against the rule of natural justice which demands that parties must be heard. He stated that he had sold to the interested parties their respective parcels from the estate and thus they joined the cause. Accordingly, it was prudent to hear them on their account to enable the court make its final determination on all issues. It was further submitted that it was the court that had allowed the interested parties to join the cause and therefore it will be unjust to strike them out at this stage when they had participated throughout the case.

The interested parties had the following to say

[4] The Interested Parties had this to say: That the petitioner had the necessary letters of representation when he sold portions of the land to them; this was confirmed by the court and issued a certificate. They submitted also that they were relying on Section 93 of the Law of Succession Act and should get protection under that section. The interested parties insisted that they were not strangers to the succession cause as they were in the confirmed grant and they had a right both in fact and in the Law of Succession to defend the grant and their position in view of Section 93 of the Law of Succession Act.

DETERMINATION

[5] The single important issue I should determine is:-

(a) Whether the interested parties, who are purchasers of the estate property, should be removed from these proceedings.

[6] Upon carefully consideration of the application before me, the rival submissions by the parties and the authorities cited by the parties, I take this view of the matter. The Petitioner and the interested parties contended that the inclusion of the interested parties in this case was by the consent of all advocates on 28th November 2012 and accordingly, it is trite law that a consent order would only be set aside on grounds of fraud or lack of practicing certificate by the consenting advocates. The proceedings of 28th November 2012 are *inter alia* as follows:

“Mr. Rimita;

We have entered appearance for 6 purchases. We seek direction that we be allowed to file necessary affidavits before the matter proceeds to hearing.

Mr. Muthomi;

I have no objection

Mr. Riungu

Mr. Rimita whispered to me his client's interest. We have no objection to leave being granted to interested party to file their affidavits. We need corresponding leave.

The court then made these recordings:

“Court;

In view of the application by the interested parties, this matter cannot proceed today. It is taken out of today’s cause list. The interested parties are meanwhile granted leave to file their affidavits within the next 14 days from today and corresponding leave to the petitioner and objectors to file further affidavits within the next 7 days from the date of service ...”

[7] Now, the question becomes; whether the said recording amount to a valid consent? *Black’s Law Dictionary* defines a consent judgment to be:-

“A judgment, the provisions and terms of which are settled and agreed by the parties to the action”

I will go further into the matter. “*Agreed judgment*” which is also termed as “*consent judgment; stipulated judgment; judgment by consent*” is also defined in the same dictionary as:-

“A settlement that becomes a court judgment when the judge sanctions it. In effect, an agreed judgment is merely a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments”

The above record of the court carries an agreement of the parties which was given voluntarily and in open court by duly instructed legal counsels of the parties. The court gave its super-added authority and sanction, thus, it became the order of the court. Accordingly, there was a valid and proper consent to enjoin the interested parties as parties in the suit which is binding on the parties herein. Mr. Riungu, the advocate for the objectors categorically told court that they had no objection to leave being granted to the interested parties to file their affidavits except he needed corresponding leave to file any relevant affidavit in response to those by the Interested Parties. It is upon the said consent or agreement of the parties that this matter proceeded to full hearing of the application for Revocation of Grant dated 2nd October 2012. It was not until 14th December 2015 that Mr. Riungu intimated to court that purchasers are never part of the estate thus provoking this instant ruling. We are grateful to Mr. Riungu.

[8] Of great significance to this matter is that, during the hearing of evidence viva voce, the objectors never objected to the interested parties being part of these proceedings. The Objectors aptly responded to the fillings by the third parties. Clearly, the contention by the objectors that purchasers can never be part of the estate is an afterthought. Nonetheless, does the objection have any legal basis? First of all, the consent order by the parties is valid and there has been no evidence that it was obtained by fraud. There is also no any other sufficient cause to set it aside or vary it. The consent is binding on the parties. Second, I do not think there is an absolute prohibition in law that a purchaser of the estate property can never be a party in a succession proceedings relating to the estate of which property he purchased. I have had occasion to deal with this subject in the case of **MERU HC SUCCESSION CAUSE NO.499 OF 2010 MECKLINA KIRIGO M’MURITHIU vs. MARY GANTUKUSI MUKIRI and 2 others [2016] e KLR** and the court stated thus:-

The law on this subject is not clear. Some courts have held that a purchaser’s claim should be litigated separate from the succession cause, whilst other have said it should be within the succession cause. The decision of the Court of Appeal in the case of *Rubo Kipngetich Arap Cheruiyot vs. Peter Kiprof Rotich Civil Appeal No. 128 of 2008* also invites diverse interpretation; when it stated as follows:-

“Claims by third parties to deceased persons ‘properties although sometimes lodged in the succession cause of the deceased person are better litigated in

separate suits". [underlining mine for emphasis]

....The Court of Appeal recognized these possibilities in the case of *Rubo Kipngetich Arap Cheruiyot vs. Peter Kiprop Rotich Civil Appeal No. 128 of 2008*(supra). Therefore, I take the view that there is no absolute prohibition of third party claims being litigated in a succession cause except this should be decided on case to case basis depending on the circumstances of each case.

[9] Other than the consent discussed above, the circumstances of this case are that the purchasers herein bought the estate property from the personal representative of the estate. Such purchasers are entitled to defend their acquisitions in this cause especially now that revocation of the grant of representation pursuant to which they were sold the land has been sought and their acquisitions are being challenged too. Accordingly, although Section 93 of the Law of Succession Act has been invoked before it is appropriately applicable, but its purport is indicative that, a purchaser of the property of the estate from a person to whom representation has been granted should, of necessity, be a party in the cause where revocation is sought and transfers of estate property to him is being questioned. A decision on revocation application will invariably be a matter of direct concern to a purchaser of a property of the estate from a person to whom representation has been granted. As a matter of substantive justice, anything short of the above will be great injustice to confront a purchaser for value of the estate property with a decree which takes away his rights without his participation. It bears repeating that each case should be decided on its merit rather than making a hard and fast rule that all claims by third parties must be litigated in separate proceedings. There are, however, those clear claims which should be tried by ELC Court. I should state that the authorities relied upon by the objectors are not exactly applicable in this case as the interested parties are not claiming to be beneficiaries of the deceased estate. For the above reasons and having found inter alia that there is a valid consent order between the parties which has not been set aside, I am unable, with tremendous respect to Mr. Riungu, to accede to his objection given the circumstances of this case. I accordingly dismiss it and direct that the matter to be concluded among all the parties as is. It is so ordered.

Dated, signed and delivered in open court at Meru this 1st day of March 2016

F. GIKONYO

JUDGE

In the presence of:

M/s Mbaikiate advocate for the interested party

Mr. Riungu advocate for objectors.

F. GIKONYO

JUDGE